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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

ASSOCIATION ON BROADCASTING STANDARDS, INC.,
MAY BROADCASTING COMPANY, AND
AMERICAN BROADCASTING COMPANIES, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,
Respondents.

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Petitioners, Association on Broadcasting Standards, Inc., May Broadcasting Company, and American Broadcasting Companies, Inc., ask that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in this case on May 10, 1968 (A. 118a).

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is reprinted in the separate Appendices filed herewith (A. 119). The Report and Order of the Federal Communications Commission (FCC) of July 13,

1967, there affirmed, is reported at 8 FCC 2d 698 (A. 1). The Commission's Memorandum Opinion and Order of October 13, 1967, denying rehearing is reported at 10 FCC 2d 283 (A. 61).

JURISDICTION

The judgments of the Court of Appeals here sought to be reviewed were entered on May 10, 1968 (A. 118). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

QUESTIONS PRESENTED

On June 10, 1940, the Federal Communications Commission issued a public statement of policy, formalized into a rule in 1941 (later Section 73.87) which permitted, with some conditions, certain daytime only standard broadcast stations and certain fulltime stations to operate during presunrise hours from 4:00 a.m. with their full daytime facilities. The stated purpose of the rule was to provide rural dwellers, traditional early risers, with needed broadcast service during presunrise hours.

Twenty-six years later, the FCC by rulemaking in 1967 amended its rules so as generally to curtail these previously authorized presunrise operations. Several fulltime and daytime only stations attacked the validity of the new rules in the Court below on varying substantive and procedural grounds. After finding that petitioners below raised "... many substantial questions, both substantive and procedural ...," (A. 123) the Court of Appeals denied the petitions for review and affirmed the Commission's new rules. The questions presented by this petition are as follows:

1. Whether the decision below affirming the Commission's new presunrise rules is in conflict with the decision of this Court in *Federal Communications Commission* v. *National Broadcasting Company, Inc. (KOA)*, 319 U.S. 239 (1943).

2. Whether the Commission's action adopting new presunrise rules has resulted in an illegal modification of outstanding broadcast licenses in violation of Sections 303(f) and 316 of the Federal Communications Act of 1934, as amended (47 U.S.C. Secs. 303(f) and 316).

3. Whether the Federal Communications Commission in its adoption of new presunrise rules acted arbitrarily and capriciously and otherwise not in accordance with law.

STATUTES AND REGULATIONS INVOLVED

1. The Communications Act of 1934, as amended, Sections 303(f), 307(b), and 316 provide as follows:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
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> * * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;
>
> Sec. 307(b). In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 316. (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

STATEMENT

A. *The Facts*—Petitioner, American Broadcasting Companies, Inc., itself or through its subsidiaries, and petitioner May Broadcasting Company, are licensees of Class III fulltime standard broadcast stations. (47 C.F.R. § 73.21(b)(1)). Petitioner, Asspciation on Broadcasting Standards, Inc., is a trade association, consisting in large measure of simliar licensees of fulltime standard broadcast stations.

In 1941, the FCC promulgated former Section 3.87 (later 73.87) of its Rules and Regulations which, in part, permitted Class III Regional Stations, whether fulltime or daytime only, to operate between 4:00 a.m. and local sunrise with their daytime antenna and power, provided "no undue interference" was caused to other stations by such operations. The rule formalized a policy of the

Commission which had been in existence since 1940, adopted in order to provide needed early morning service to farmers and other persons residing in rural areas. Over the years, many daytime only and fulltime stations provided presunrise service under this rule. Fulltimers used the rule because their nighttime pattern and power is generally inferior to that authorized for daytime operations.

The FCC on December 8, 1961 issued a Notice of Proposed Rule Making (FCC 61-1446) in Docket No. 14419 which looked toward amending Rule 3.87 so as to restrict the presunrise operations of many standard broadcast stations. A Further Notice of Proposed Rule Making was released by the Commission in this proceeding on November 30, 1962 which proposed to limit presunrise operations generally to stations in communities without a local fulltime station. Pending consideration of the new rules, presunrise operations by new stations were generally interdicted.

On July 13, 1967, the Commission issued its Report and Order (A. 1) in which it adopted new rules generally restricting the presunrise operations which petitioners' stations and others had engaged in for many years. Under the new presunrise rules power was limited to 500 watts or less fed into the daytime antenna system, beginning at 6:00 a.m., local standard time. Petitioners therefore could either begin presunrise operations at 6:00 a.m. using their daytime antenna, limited to a maximum of 500 watts, or they could use their authorized nighttime pattern and power until local sunrise. Either way, the presunrise service previously furnished by petitioners' stations was severely cut back.[1]

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[1] While the Commission's original aim in relaxing radiation restrictions in the presunrise period was to improve service to rural areas, in more recent years numerous stations had come to rely on the presunrise rule as a means of remedying deficiencies in service to their principal communities arising from directional antenna limitations, increasing noise levels, interference from other stations and similar causes (R 1206-1227).

Moreover, under the old rule, a fulltime station could preclude presunrise operation by any other station on the same frequency, if it could show undue interference to its licensed nighttime service area. Under the new rules that right is no longer recognized.

B. *The Decisions Below.*—Petitions for review under Section 402(a) of the Communications Act of 1934, 66 Stat. 718, as amended, 47 U.S.C. § 402(a), and under Section 4(e) of the Administrative Orders Review Act, 80 Stat. 622, 28 U.S.C. § 2342, were filed in the United States Courts of Appeals for the Second, Ninth and the District of Columbia Circuits. The several petitions were eventually consolidated for briefing and argument before the Second Circuit pursuant to 28 U.S.C. § 2112(a), 72 Stat. 941.

It was argued before the Court below, *inter alia*, that the new rules would result in a modification of petitioners' outstanding licenses without being first afforded an evidentiary hearing as provided for by Sections 303(f) and 316 of the Communications Act of 1934, as amended. In this regard petitioners relied upon *Federal Communications Commission* v. *National Broadcasting Company, Inc. (KOA)*, 319 U.S. 239 (1943).

Petitioners also alleged as error that the Commission failed to state a factual basis for the rules adopted, resulting in an arbitrary and capricious action, an abuse of discretion in violation of 5 U.S.C. § 706, 80 Stat. 393, and of Section 307(b) of the Communications Act of 1934, as amended.

The Commission admitted in its Memorandum Opinion and Order, and in its brief before the Court below that it did not know whether adoption of its new rules would result in a net gain or a net loss of service to the public (R. 3545, 3564, 4073). It stated that it refused to engage in a "numbers game" and that in any event its determinations did not rest on "quantitative" factors (FCC

Br. in Nos. 346 and 347, p. 27). The Commission also concluded that ". . . the service to be gained, while perhaps quantitatively less than that to be lost, was more in the public interest because it would provide service where there was a greater need for it" (*Ibid*).

Petitioners pointed out to the Court below that the Commission's two statements in adopting the new rules failed to contain adequate findings of fact to show what "qualitative" advantage the Commission found in the new service permitted by the new rules over the service lost as a result of their adoption. The court was therefore requested to strike the rules as arbitrary.

The Second Circuit held in substance that, although the adoption of the Commission's new rules had resulted in additional interference to petitioners' licensed nighttime operations, and modified their outstanding licenses, petitioners were not entitled to the hearings provided for by Sections 303(f) and 316 of the Communications Act, since the modifications resulted from general rulemaking proceedings not requiring individual adjudications. It so concluded notwithstanding this Court's decision in *Federal Communications Commission* v. *National Broadcasting Company, Inc. (KOA)*, 319 U.S. 239 (1943). The Court below held that *KOA*, *supra*, stands only for the proposition that, where a hearing on an individual application is necessary, a licensee who would be aggrieved by a grant of the application had the right to participate therein (A. 151).

The Court below also held that interference to petitioners' licensed nighttime facilities resulting from the new rules did not entitle petitioners to a hearing under Section 303(f) of the Act, since such interference does not affect changes in the "frequencies, authorized power, or in the times of operation of any station" and therefore § 303(f) by its terms does not apply.

Furthermore, the Court held that Section 303(f) did not apply to the reduction in power and hours of presun-

rise operation formerly engaged in by petitioners' stations, "[since] under the old rule these stations did not even have the right to demand an evidentiary hearing to challenge whether the limitations the Commission set upon their operation were in the public interest . . . ." (A. 154).

Finally, the Court held that the Commission was not required to determine whether the adoption of its new rules would result in a net gain or a net loss of service, was not obliged to consider program service in supporting the adoption of its new rules on the qualitative basis of "need", and that considerations of administrative expediency provided a rational basis for the new rules.

REASONS FOR GRANTING THE WRIT

1. *The Decision Below is in Direct Conflict With an Applicable Decision of this Court and Violates Substantive Statutory Requirements.*—The decision of the second Circuit is in direct conflict with that of this Court in *Federal Communications Commission* v. *National Broadcasting Company, Inc. (KOA)*, 319 U.S. 239 (1943).

There, this Court held that where the Commission amends its rules and accepts for filing an application for a proposed change in facilities of an existing station not possible prior to the rule amendment, a grant of which would result in increased electrical interference to another station, the latter is entitled to participate in an evidentiary hearing before the application can be granted.

The instant case presents an identical question. Here the Commission amended its rules and granted authorizations which have modified petitioners' outstanding licenses by subjecting their operations to increased electrical interference. Such action was taken without affording petitioners a hearing, in contravention of Sections 303(f) and 316 of the Communications Act and the holding of this Court in *KOA*.

The Court below failed to recognize that *KOA*, like the instant case, involved rule making. Accordingly, the Second Circuit's attempt to distinguish the present case from *KOA* on the grounds that *KOA* involved only an adjudicatory proceeding is unsound.

In *KOA*, the rule allocating Class I-A frequencies was changed. Here, the Commission changed its rule governing presunrise operations. In *KOA*, the amended rule would have permitted a new authorization resulting in interference to an existing licensed station. Here, the new rule has permitted hundreds of new authorizations causing co-channel interference to the licensed nighttime operations of hundreds of other stations.

The essential holding of *KOA* was ignored by the Court below, namely, that the FCC's rules as they exist at the time a broadcast license is granted are incorporated into the terms of that license even though not set forth on its face. Therefore, any change in those rules affecting the service rendered by the licensee is a modification of license requiring a prior hearing.

Section 316 of the Communications Act of 1934, 66 Stat. 718 (1952), is the successor to Section 312(b), which was construed in *KOA*. As the legislative history shows,[1] the intent of Congress in adopting the present Section 316 was to make specific in the statute what this Court held in *KOA*. Hence, this Court's decision applies with equal force to modifications of license under Section 316 of the Act.

In addition, new rules were adopted without according petitioners the evidentiary hearing required by Section 303(f) of the Communications Act. By requiring petitioners to forego presunrise operations with their daytime facilities prior to 6:00 a.m., the Commission has changed

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[1] See, House Report No. 1750, 82 Cong., 2nd Session, April 8, 1952, 1952 U.S. Code Cong. and Admin. News, 2234, 2248.

their "times of operation." By increasing the interference to petitioners' licensed nighttime operations, the Commission has changed the effective power of petitioners' stations. Both changes under Section 303(f) require a prior evidentiary hearing. See *Saltzman* v. *Stromberg-Carlson Telephone Manufacturing Co.*, 46 F. 2d 612 (D.C. Cir. 1931); *Courier-Journal Co.* v. *Federal Radio Commission*, 46 F. 2d 614 (D.C. Cir. 1931) (construing predecessor language of the Radio Act of 1927).

The Court below rejected the argument that petitioners' power had been changed as a result of the additional interference caused to their licensed nighttime operations under the new rules. The Court claimed that such interference would change only a station's "effective power," and such a change did not entitle a station to an evidentiary hearing under the terms of Section 303(f).

The Commission made a like argument in *KOA*, claiming that interference to a station did not modify its license when the power and frequency stated in the license are unchanged. This Court in construing the hearing requirements of Section 312 rejected that argument as "too narrow a view." The similar narrow view of the Court below should be rejected here in interpreting Section 303(f) of the Act.

At the time the licenses of petitioners' stations were most recently renewed, former Section 73.87 of the Commission's Rules were still in effect. The rule permitted them to operate with the authorized daytime facilities from 4:00 a.m., unless and until they were notified that such operations were causing "undue interference." The provisions of Section 73.87 of the Rules, under this Court's holding in *KOA*, became incorporated into the terms of petitioners' licenses. Under the old rule these presunrise operations could not be terminated by the Commission without first notifying petitioners that they were causing undue interference, a question of fact on which petitioners

were entitled to a hearing. *Music Broadcasting Company*, v. *FCC*, 217 F. 2d 339 (D.C. Cir. 1954). The Commission, in summarily terminating such operations by amending its rules, has changed petitioners' currently licensed hours of operation, and has violated petitioners' rights to an evidentiary hearing as guaranteed by Section 303(f) of the Communications Act of 1934, as amended.

2. *In Expanding the Rulemaking Powers of the Commission and Other Administrative Agencies and Correspondingly Curtailing Hearing Rights Conferred on Private Parties by Congress and Due Process, the Court Below Has Decided an Important Question of Federal Law Which Should be Resolved by This Court.*—The Court below has held that the Commission can by rulemaking do what it is otherwise prohibited by statute from doing, namely, modify the licenses of broadcast stations during their outstanding terms, without first offering the licensees adversely affected their right to an evidentiary hearing as provided for by Sections 303(f) and 316 of the Communications Act of 1934, as amended. Such a conclusion is in conflict with the opposite holdings of two cases decided by the United States Court of Appeals for the District of Columbia Circuit. *Transcontinent Television Corporation* v. *FCC*, 308 F. 2d 339 (1962); *The Goodwill Stations, Inc.* v. *FCC*, 325 F. 2d 637 (1963). The Second Circuit deemed these cases distinguishable because it believed the scope of the rulemaking proceedings there involved to be less broad than in the present proceeding (A. 151). *Goodwill*, at least, cannot be so distinguished.

In holding that current licenses can be modified without hearing by the rulemaking process, the Court relies primarily on *California Citizens Band Association* v. *United States*, 375 F. 2d 43 (9th Cir. 1967), cert. denied, 389 U.S. 844 (1967); *Airline Pilots Association, International* v. *Quesada*, 276 F. 2d 892 (2nd Cir. 1960), and

American Airlines, Inc. v. *CAB*, 359 F. 2d 624 (D.C. Cir., *en banc*, 1966), cert. denied, 385 U.S. 843, none of which makes even passing reference to *KOA*.

Moreover, the decision below failed to point out that the Court in *California Citizens Band, supra*, agreed with the Commission that "public evidentiary hearings" are required before basic license rights, such as those involved here, can be changed. *Airline Pilots Association, supra*, involved urgent public safety questions not presented here, and the *American Airlines* case *supra*, was prospective in its effect upon service, whereas here the Commission's new rules remove service of many years' standing upon which the public had come to rely.

3. *The Decision Below is Bottomed on Inadequate Agency Findings and Contravenes Section 307(b) of the Communications Act.*—The principle is well established that the conclusions of an administrative agency are subject to judicial review, and "for that purpose the reviewing authorities must know the bases upon which the conclusions rest." *American Trucking Associations, Inc.* v. *FCC*, 377 F. 2d 121, 134 (D.C. Cir. 1967). Here the Commission supplied no rational bases for the actions it took.

The Commission admitted below that it did not know whether its new rules would result in a net gain or a net loss of service to the public. It stated simply in this regard that it refused to engage in a "numbers game" (R. 3545) and that in any event its determinations did not rest on "quantitative factors." It claimed that its decision to adopt its new restrictive presunrise rules was on the basis of the "material studied and on its own expertise, [that] the service to be gained, while perhaps quantitatively less than that to be lost, was more in the public interest because it would provide service where there was a greater need for it."

The Commission did not indicate what non-quantitative factors, if any, it considered in finding a "greater need" for the new presunrise services, to be established at the expense of deleting or restricting long-established services for which a need had been shown. The Commission made no study of the particular program needs of each area. The Commission's Orders herein are devoid of any findings that the stations serving or proposing to serve those areas during presunrise hours were, in fact, meeting or proposing to meet those program needs.

The Court below accepted the Commission's contention that it was not required to consider program needs. Thus, it becomes clear that the Commission totally failed to articulate valid reasons for the adoption of its new rules which would result in a net loss of broadcast service to people throughout the United States. Without weighing the only quantitative or qualitative considerations available to it, the Commission had no intelligent way to determine whether its new rules would result in a proper distribution of licenses, frequencies, hours of operation, and of power among the several states and communities so as to provide the fair, efficient and equitable distribution of radio service required by Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b). Therefore, the Commission's action in adopting its new rules was not based on proper findings of fact, was arbitrary and capricious, and should have been reversed and remanded by the Court below.

The attempt of the Second Circuit to support the result reached by the Commission on grounds other than those stated by the agency itself contravenes *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196-197 (1947).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the decision below be reviewed by this Court on Writ of Certiorari.

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